



POST OFFICE GLO

PRELIMINARY COMMENTS ON SETTLEMENT

IN ADVANCE OF MEETING WITH RICHARD WATSON AND TOM COOPER ON 18 JULY 2019

Introduction

1. The purpose of this note is to set out our preliminary thoughts on how we envisage the proposed settlement process working with specific reference to (a) timelines; (b) preparation (including further information from the Claimant Group); (c) analysis of the Claimant Group; and (d) costs.

Broad Timelines

2. It has been agreed between the parties that (a) a mediation should take place; and (b) the mediator should be Charles Flint QC.
3. In broad terms, we envisage a staged approach to settlement comprising:
 - a. an initial mediation designed to obtain information and gauge expectations, ideally in September or October 2019;
 - b. a formal settlement offer process designed to protect PO's position in the litigation, planned for late 2019 or early 2020;
 - c. a further mediation at which we hope to make meaningful progress towards settlement, ideally in April/May 2020;
 - d. further ad-hoc settlement discussions leading to a final settlement; and
 - e. development of a strategy for dealing with SPMs who are have not joined the GLO but may bring claims in the future.
4. Mediation is a consensual process and so it is not possible to be prescriptive about timings. We are presently in correspondence with the Claimants as regards the timing of the first mediation and the position reached will likely drive the timetable going forward. The current status is as follows:
 - a. PO has proposed that a mediation takes place in September 2019 to take advantage of the lull in the timetable while the Horizon judgment is awaited.
 - b. The Claimants wish to mediate only after (i) the Horizon judgment has been handed down; and (ii) the outcome of PO's application for permission to appeal is known. A mediation which caters for those contingencies would not take place before mid-October, which may be impractical – at least for the Claimants' resourcing requirements - as the parties will then be engaged in a tight timetable leading up to the next (Further Issues) trial, scheduled for March 2020. The Claimants may use this as an excuse for deferring the mediation further.
 - c. Although we cannot force the Claimants to agree to a date, we are hoping to reach an agreed position that the March 2020 trial date is pushed back which would create a window for the mediation in the procedural timetable. Discussions are ongoing.
5. If, as we understand, PO will not have settlement authority in excess of £50m for any mediation that takes place in September/October 2019, it is unlikely that the GLO will settle at that time. £50m will not cover the Claimants' expected funding/costs commitments (on current best estimates, these stand at circa £68m) and, given the success the Claimants have had to date, it is doubtful the Claimants would be prepared to exit the litigation at a loss. We would, however, hope to make some progress at the first mediation in understanding the Claimants' expectations and, in particular, the true values attached to their funding arrangements.
6. Following the mediation, we would suggest making a Part 36 or Calderbank offer with a view to (i) obtaining a degree of costs protection going forward; and (ii) putting some corresponding



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pressure on the Claimants to settle.¹ Otherwise, the Claimants may consider they will have a "free run"² at PO for the duration of the litigation, which will simply encourage them to persist with their claims.

7. We have then made provision for a second mediation, probably after the Further Issues Trial, at which we hope to make meaningful progress with regard to settlement.

Preparation

8. We have structured our own preparations in order to be ready to mediate in September/October 2019.
9. Attached is a timeline of the various steps we are taking. In summary, the key workstreams taking place are:
 - a. **Quantum verification** - Much of the key information needed to calculate the true value of the Claimants' claims (for example the size of the shortfalls and the Claimants' earnings-based claims) is in PO's systems. We are therefore working with Angela van den Bogard and Nick Beal to build up a settlement spreadsheet based on PO's own data which can be used to build up our own, verified picture of the quantum of the claims. In due course we will also be able to use this spreadsheet to apply our own assumptions to the figures when analysing settlement scenarios.
 - b. **Recoverability analysis** - We have also begun analysing the recoverability in principle of the Claimants' various heads of loss. In some cases, recoverability will depend upon (i) the outcome of the Common Issues Appeal; (ii) the Horizon judgment; and, in the case of some heads of loss, (iii) evidence from the Claimants which is not yet to hand. Given these variables, we would prefer not to offer any concluded views yet. However, we have reached some provisional conclusions which are summarised below. This exercise will help us assess risk and take decisions on which heads of loss to carve out when formulating settlement proposals at an early mediation.
 - c. **Development of case theory** - Work will need to be done to develop a case theory on liability. The objective of these investigations would be to set up a basis for applying a percentage discount to the claim value for liability risk and also demonstrate more broadly to the Claimant Group that their "winning streak" will not continue indefinitely. What that percentage discount might be will depend on the facts of the individual cases. In that regard, we will need to:
 - look at the claims of individuals (i.e. are there "bogus" Claimants or Claimants where there is independent evidence of liability, untainted by Common Issues duties or adverse findings made in the Horizon trial); and
 - liaise further with PO's IT expert following receipt of the Horizon judgment to see if PO will be in a position to demonstrate whether (or not) the bugs found to exist were in fact the cause of the Claimants' losses.
 - d. **Strategy for dealing with particular categories of Claimants** – Particular strategies will be needed for dealing with (a) convicted Claimants; (b) Claimants who have already entered into settlement agreements; and (c) time-barred Claimants.

¹ The process for doing so in the context of a GLO is not free of difficulties. The right approach will require further analysis.

² Provided the Claimants recover something in each trial, they are likely to be treated as the "successful party" and the working assumption is that they will recover their costs.



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Outstanding Information

10. As a general point, it is fair to say that, given the way the litigation has progressed, PO does not have all the information it would need to form a concluded view on the size of its exposure in respect of any one category of claim.
11. That said, the work we have done on quantum verification thus far suggests to us that, in relation to many of the more crucial heads of loss, we should be able to draw information from PO's own records and otherwise make rough-and-ready assumptions for the purposes of settlement to fill the gaps. Doing so will place a practical onus on the Claimants to supply missing information if they wish to rebut the numbers we have used or the assumptions we have made.
12. In all these circumstances, we would not recommend approaching the Claimants for further information to substantiate their claims, at least at this stage. Particularly in respect of the more outlandish heads of claim, we consider PO is better off taking the position that the Claimant has not discharged the onus of proving the losses in question and, unless and until it does, PO does not intend taking them into account for the purpose of settlement. If, on the other hand, we invite further information, that will simply encourage the Claimants to produce material which (or so they will say) increases their headline numbers.

Analysis of Heads of Loss and the Claimant Group

13. Attached is an outline of the Claimants' claims, categorised by head of loss and, where applicable, Claimant cohort.
14. Some preliminary thoughts and notes of progress in relation to each category of claim are set out below.

Category	Number of Samples
0	1000
1	998
2	995
3	992
4	988
5	985
6	982
7	978
8	975
9	972



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Repayment of Shortfalls - £13m

16. Assuming liability is established, this head of loss will be recoverable subject to verification of the sums claimed. The key issue is likely to be the onus of proof. If the Horizon Judgment concludes that Horizon is not reliable evidence of the size of the shortfalls (e.g. due to bugs) the onus will be on PO to prove the shortfalls in other ways. In many cases this may be difficult or impossible to do.

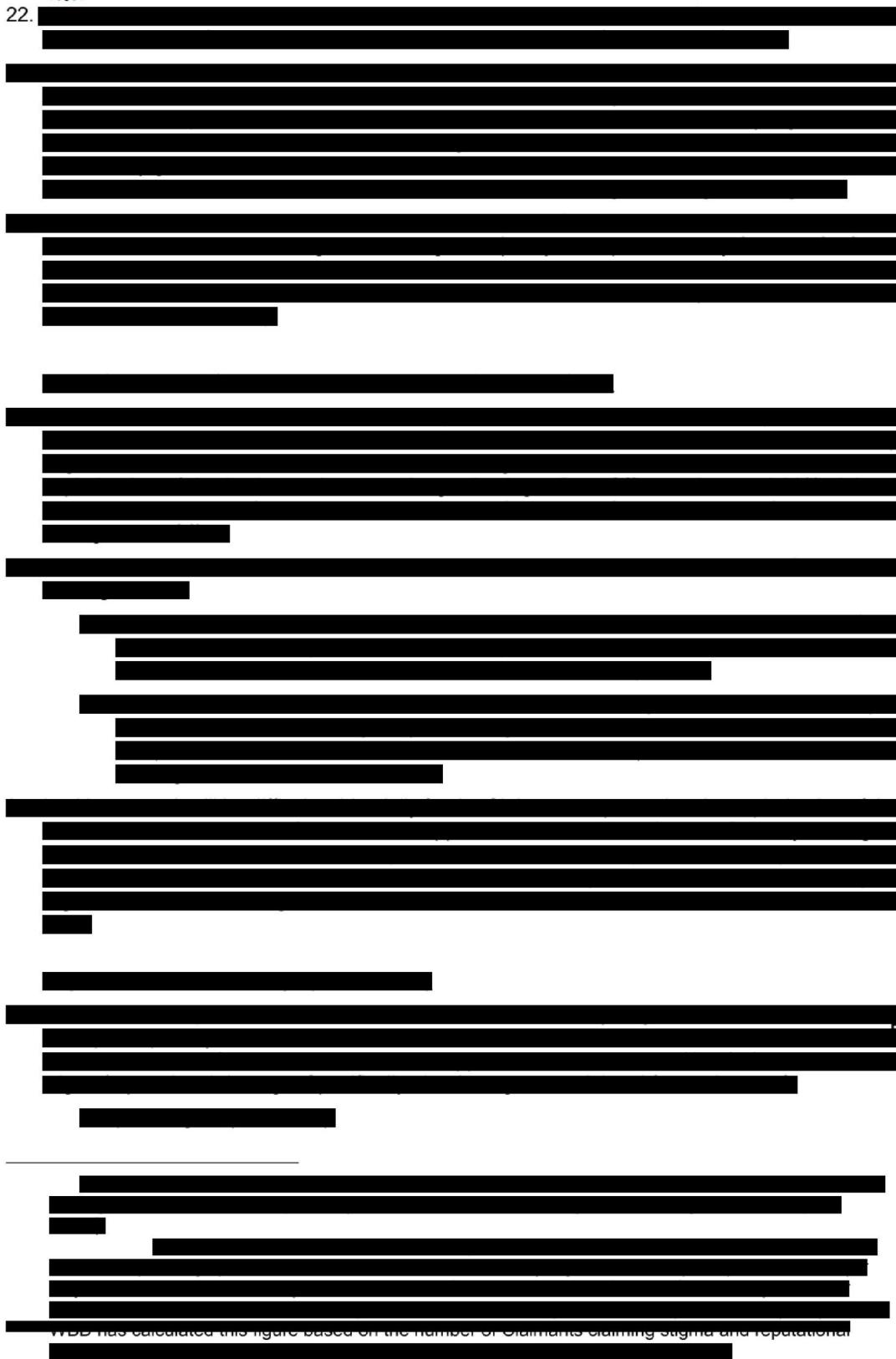
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22.





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WBB has calculated this figure based on the number of claimants claiming personal injury loss (S19).



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Convicted Claimants

38. This is likely to be the most problematic cohort of Claimants to deal with for the purpose of settlement. They are the most vocal, raise the most significant reputational issues for PO and will also likely be the most difficult to appease. This is unsurprising: if someone was wrongfully convicted, then they can fairly say that their lives have been ruined. By the same token, if PO settles with Claimants who were properly convicted, it will in effect be admitting to failures in the criminal process which PO, exercising its prosecutorial powers, participated in.
39. Although PO has taken advice from time-to-time on how to deal with convicted SPMs and has undertaken several reviews of old cases, the advice in question does not address the key question of whether the convictions are in fact unsafe. As a matter of criminal procedure, we are told that PO's duty is simply to ensure that proper disclosure is given. It is then for the Claimants to approach the Criminal Appeals Court (through the CCRC or independently) to make a case on appeal. As a practical matter, parties appear to be awaiting the findings of the civil courts before taking action. Nor is the advice necessarily current (we note in particular that the findings made in Horizon may change the landscape). PO will therefore probably need to undertake a fresh review of the criminal cases once the Horizon judgment is to hand. Subject to the findings made, it may also have a duty to make additional disclosures to affected parties.
40. In the meantime, there are several observations we can make about convicted Claimants:
 - a. From a settlement perspective, it is extremely difficult for PO to deal with convicted Claimants otherwise than on principled grounds.
 - b. Given the above, a sensible approach may be to carve out the criminal Claimants from any settlement proposal to enable them to pursue their appeals in the criminal courts in



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light of the findings in the Horizon trial. PO could facilitate this in various ways - by co-operating with the CCRC, by offering funding (potentially repayable if the appeals fail) and/or by facilitating an independent review with a view to making recommendations as prosecutor. Criminal Claimants who succeed could then be offered the same deal as other Claimants, with a sweetener to compensate for losses associated with the convictions.

c. The resistance PO would face is that this would be perceived as excluding convicted Claimants from settlement and creating additional hurdles to recovery. The true position, we understand, is that is an abuse of process for convicted Claimants to pursue their claims in the civil courts while their criminal convictions stand. PO could therefore try to deal with this by forcing Fraser J to make the decision as to whether convicted Claimants can form part of the litigation pending the outcome of the criminal process. This could be achieved by taking forward the test-claim process in the context of which Fraser J could be asked to direct whether convicted Claimants can or should form part of the test Claimants eligible for selection. That way, the decision is taken out of PO's hands.

The relevant wording was: "In final and final settlement, the Appraiser releases any and all claims, whether

THE FOREST AND THE WOLF - THE COMMUNITY'S CHALLENGE TO THE STATE IN DIRECT TAXES AND DIRECT SPENDING



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Potential Settlement Structures

44. There are a number of ways to approach the settlement of this litigation:

- a. A ground-up recoverability analysis: This is the conventional approach and involves analysing the legal merits of the Claimants' claims (both in principle and as a matter of quantum) and applying appropriate percentage discounts for risk. If this approach is taken, PO may face the issue that the Claimants are unwilling to settle at a value which approximates PO's true legal liability - either because the Claimants feel they have been wronged or because their funding and costs liabilities will eat up the lion's share of any liability-based offer that is made. Given the reputational considerations at stake, PO will need to assess whether it is willing to over-pay in order to dispose of the litigation.
- b. A "PO is better off paying" scenario analysis: This approach aims to provide an answer to unrealistic demands from the Claimant Group driven by their costs and funding arrangements by identifying the amount it would cost to simply pay the claim. This amount would exclude sums payable in respect of the Claimants' funding and costs commitments because those are not losses recoverable at law. It is bound to involve taking into account heads of loss which would not be recoverable at law.
- c. A pragmatic analysis, which budgets for (a) payment of the Claimants' funding/costs commitments and (b) a (proportionately reduced) top-up payment to each individual Claimant, at a level acceptable to the Claimants in question. This option has advantages for PO's future dealings with SPMs who may have claims but are not Claimants in the litigation. Such Claimants will not be saddled with weighty costs and funding commitments. PO could therefore offer them "the same deal" that Claimants in the GLO received at significantly lower cost.

45. The claims spreadsheet we are building aims to be able to produce verified figures in all these scenarios which can then be considered in order to arrive at an appropriate settlement range. Key to the analysis, however, will be the Claimants' expectations – hence our recommendation for a staged settlement approach.

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Costs

49. In the latest costs update to the Court (in late May / early June 2019), the Claimants' legal costs were £12.6m (excluding any funding costs). The Claimants have not provided a further update on their legal costs. It is anticipated that the Claimants will have incurred a further £1m in costs up until the end of the Horizon trial.
50. Post Office's legal costs up until the end of the Horizon trial are estimated to be around £14.9m.
51. Womble Bond Dickinson has provisionally estimated that the cost of the Further Issues trial will be £3m - £5m. This estimate will be revised when the Claimants set out their cases for this trial. It is anticipated that the Claimants' costs will be substantially less than PO's costs because they have significantly fewer documents to disclose and fewer witnesses to call.
52. We anticipate that our costs for the advisory and mediation workstreams will be around £1m to the end of the year. In the event that Permission to Appeal the Common Issues judgment is awarded we will revise this estimate.

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PO: Group Litigation Settlement Timetable

	W/c 1 July	W/c 8 July	W/c 15 July	W/c 22 July	W/c 29 July	W/c 5 Aug	W/c 12 Aug	W/c 19 Aug	W/c 26 Aug	W/c 2 Sep	W/c 9 Sep	W/c 16 Sep	W/c 23 Sep	W/c 30 Sep	W/c 7 Oct	W/c 14 Oct	W/c 21 Oct	W/c 28 Oct
Creation of Claims Database	<ul style="list-style-type: none"> Analysis of SOIs Collation of base remuneration data Verify service and contractual data Verify shortfall data Transfer data to HSF Belfast HSF Belfast analysis of data Creation of verified claims spreadsheet 																	
Mediation Arrangements		<ul style="list-style-type: none"> Correspondence with Freeths to fix dates Room bookings Sign mediation agreement 																
Development of Case Theory				<p>Identify and develop evidence on areas of weakness in the Claimants case:</p> <ol style="list-style-type: none"> Identify and develop evidence on individual Claimants Expert evidence that bugs could not have caused shortfalls? 														
Recoverability Analysis	<ul style="list-style-type: none"> Legal analysis on recoverability of heads of loss to cover Identify outstanding information Consider possible information requests of Claimants 																	
Strategy for convicted Claimants	<ul style="list-style-type: none"> Collate advice from Cartwright King and Brian Altman QC Review historic position Strategy for settlement of GLO PO approach to resolving issues with convicted Claimants Analysis of reputational considerations 																	
Absorb Impact of Horizon Judgment														<ul style="list-style-type: none"> Analyse findings made Develop case theory around findings 				
Absorb Impact of grant/refusal of permission to appeal													<ul style="list-style-type: none"> Analyse impact of order made (e.g. permission given on some grounds not others) Merits advice on appeal 					
Settlement Recommendations and PO Authorisations													<ul style="list-style-type: none"> Recoverability analysis "Better off paying" scenario analysis: cost of paying verified heads of loss plus recoverable costs (i.e. excluding funding costs) "Settlement formula" scenario analysis "Cohort-by-cohort" scenario analysis 					
Mediation Preparations													<ul style="list-style-type: none"> Exchanges of information (if applicable) Prepare position paper 					
Mediation														<ul style="list-style-type: none"> Pre-meet with mediator and sharing of mediator-only information Mediation session Post mediation exchanges 				
Part 36/ Calderbank Offer following mediation									<p>Analysis of legal position on costs protection available under group and individual offers in GLO scenario</p>									Formulation of offer(s)
Second mediation (April/May 2020)																		



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Breakdown of Quantum⁹

Claimants' costs

Costs	Fees
Freeths' legal fees	Headline fees: £12.7m Conditional Fee Uplift: £12.7m (WBD estimate) Total: £25.4m
Litigation insurance / Security for Costs	£5.9m (WBD estimate)
Funder's return (Therium)	£37m (WBD estimate)
Total	£68.3m

⁹ This information is based on WBD's Settlement Briefing Paper dated 19 May 2019 and the accompanying presentation. The figures have not been verified by HSF.
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